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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 593

JOSEPH G. BRAND and ANTON A. MORVAY,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS
and
BRIEF IN SUPPORT THEREOF.

JOSEPH G. BRAND, *pro se*
ANTON A. MORVAY, *pro se*

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PETITION FOR A WRIT OF CERTIORARI.

Joseph G. Brand and Anton A. Morvay, present this, their petition for a Writ of Certiorari to be directed to the Supreme Court of the State of Illinois to review a judgment of that court of May 20th 1953, after which a petition for rehearing was denied on September 21, 1953, affirming a judgment of conviction of your petitioners in the case of *Joseph Brand and Anton A. Morvay,* Plaintiffs in Error v. *People of the State of Illinois,* Defendants in Error. No. 32374 in the Supreme Court of Illinois. Time for the filing of this petition was extended conditionally on December 21, 1953 to February 15, 1954.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioners were indicted for violation of Section 256, Chapter 38, Illinois Revised Statutes (1953) which provides: "Every person who shall obtain . . . any money, property or credit by means or by use of any false or bogus check or by any other means, instrument or devise commonly called the confidence game shall be imprisoned in the penitentiary not less than one year nor more than ten years."

The indictment stated that both of the petitioners . . . "unlawfully, feloniously and fraudulently did obtain from Herbert Bomar and Rosemarie Bomar a large amount of personal goods and property . . . by means and by use of the confidence game which conformed, in terms with Section 257, Chapter 38 Illinois Revised Statutes, (1953) (R. 273-275).

They were tried before a jury which returned a verdict of guilty. *Inter alia,* they made a motion in arrest of judgment which was denied (R. 223).

The Court then pronounced its judgment and sentence. (R. 223, 224)

Thereafter they sued out a writ of error to the Supreme Court of Illinois and assigned as error:

"Sections 256 and 257 of Chapter 38 of Illinois Revised Statutes are unconstitutional as being repugnant to . . . Section 1 of the 14th Amendment to, the Constitution of the United States" (R. 231). They argued this point in the Supreme Court of Illinois (Brief and Argument for Plaintiffs in Error pages 13 (2); 16, 17, 22-33).

The Supreme Court of Illinois held, on this specific point, in substance that, since the defendants failed to raise

this question, *i.e.*, the constitutionality of the Act under which they were indicted, in the court below they could not raise it in that court, the Supreme Court.

Statutory Provision Believed to Sustain Jurisdiction.

This is a petition for a Writ of Certiorari to review a decision of the Supreme Court of Illinois, a State Court of last resort.

The statutory provision believed to sustain jurisdiction is U.S.C.A. Title 28, Section 1257(3).

The Reasons Relied On For the Issuance of the Writ.

1. The Supreme Court should have declared Sections 25½ and 25¾, Chapter 38, Illinois Revised Statutes, 1953 violative of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States, because singly and together they are so vague that no person can know what the first section (256) proscribes and no person can know under the second section (257) with what act or acts he is alleged to have done in violation of the first section (256).

2. The Supreme Court of Illinois should not have refused to pass on the constitutional question shown in (1) above because in an unbroken series of cases beginning over a century ago, it has held that any question concerning the validity of an indictment might be raised at any time in the judicial process including a reply brief and because implicit in the testing of the adequacy of an indictment is the constitutionality of the law upon which it rests.

(3) No state, by judicial determination may reverse, in a case pending for its decision, the settled procedural law of that state so as to deprive a litigant of the only pro-

cedure theretofore available to him for a determination of the constitutionality of the law on which he has proceeded in reliance on such settled law.

An additional reason is the importance in the administration of State Criminal Law in the several states having similar laws, of determining whether the Statutes here called in question are repugnant to the Fourteenth Amendment to the Constitution of the United States.

Prayer for Allowance of Writ of Certiorari.

Wherefore your petitioners Joseph G. Brand and Anton A. Morvay pray this Honorable Court to issue a Writ of Certiorari to the Supreme Court of the United States commanding that court to certify and send to this court for its review and determination, on a day certain to be named therein, the record of proceeding had to the end that the judgment of the Supreme Court of Illinois may be reviewed and reversed by this court.

Respectfully submitted,

Joseph G. Brand

JOSEPH BRAND
Pro se

Anton A. Morvay

ANTON MORVAY
Pro se.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

A person said to be convicted of a violation of a law which is unconstitutional is not convicted in a real sense. *Ex parte Siebold,* 100 U.S. 371, 376.

II.

The Illinois Statute, Section 256, Chapter 38 of Illinois Revised Statutes, 1953 is on its face violative of the Fourteenth Amendment in that it does not define what is forbidden with "appropriate definiteness." It proscribes the

taking of "money, property or credit by . . . use . . . of . . . any bogus check or by any other means, instrument or device commonly known as the confidence game." Such is the applicable part of the Statute under which the petitioners were indicted. When considered together with the next section, Section 257 Chapter 38 of Illinois Revised Statutes, which states that the indictment shall be held to be sufficient if it charges the "accused did . . . obtain . . . money or property by means and by use of the confidence game; it will be observed that the accused not only has no opportunity of knowing what the proscribed conduct may be but he may also be left without knowledge of the act or acts he is alleged to have committed which are supposed to be violative of Section 256.

This Act, is, we contend, much more indefinite than that of the New York Statute struck down in *Winters* v. *New York,* 333 U.S. 507 and similar to that declared to be violative of the Fourteenth Amendment in *Lanzetta* v. *New Jersey,* 306 U.S. 451. We are fortified in our contention in this respect by the Illinois Supreme Court. In *Maxwell* v. *The People,* 158 Ill. 248, 256, it confessed "It is difficult to give a definition of what is commonly called the confidence game." It turned to Webster's Dictionary for a definition of "confidence game" and applied that definition to the facts in that case. It is suggested that that definition left out the most important words; "commonly known", and it is contended that there could be greatly variant ideas as to what is meant by what is "commonly known as the confidence game."

Again in *The People* v. *Warfield,* 261 Ill. 293, 322, the Illinois Supreme Court recognized "The statute is indefinite as to what constitutes the confidence game."

And in *Dorr* v. *The People,* the Supreme Court of Illinois divided five to four on the question of whether the proof

in that case established the crime of obtaining money by means . . . of what is commonly known as the confidence game. *United States* v. *Cf. Cohen Grocery Company,* 255 U.S. 81.

In *Morton* v. *The People,* 47 Ill. 468 the validity of the Statute was upheld against the charge that the second section of the Statute was violative of Section 9 of Article 13 of the Illinois Constitution of 1848 which dealt with rights to demand the nature and cause of the accusation, trial by jury and other civil rights.

In answer to this the Court said:

> "Now, as these devices are as various as the mind of man is suggestive, it would be impossible for the legislature to define them and equally so, to specify them in an indictment; therefore the legislature has declared, that an indictment for this offense shall be sufficient if the allegation is contained in it that the accused did at a certain time and place, unlawfully and feloniously obtain the money . . . by means and use of the confidence game, leaving to be made out by proof the nature and kind of the devices to which resort was had." (p. 474)

We say this is a confession which condemns this law as violative of the due process of law clause of the Fourteenth Amendment of the Constitution.

Certainly, anciently, and now due process of law requires that some time before the State closes its case against an accused person, he is entitled to know what he is accused of doing in violation of criminal law. But in that case, the Supreme Court tacitly approved a law which stated that indictments should be couched in language which the jury could easily understand. (p. 474). We have no objection to this but we contend that is of much greater importance that the indictment be couched in such language that the accused can understand the nature of the charge against him, and

greatest of all, we contend, is that the law proscribing conduct be couched in language that everyone can understand.

III.

The Supreme Court of Illinois refused to consider the constitutionality of the statutory provisions called into question here, because it said these questions were not raised in the lower court. We contend that the cases cited by the Supreme Court of Illinois do not sustain it and more we contend that it turned its back on a century of cases holding the very opposite of its holding on this question in this case.

The case was presented to the Supreme Court of Illinois by a writ of error.

For over a century the law of Illinois has been that review by writ of error, raises questions which might have been raised by a motion in arrest of judgment, one of which is the sufficiency of the indictment. *Klawanski* v. *The People,* 218 Ill. 481; *Sweeny* v. *The People,* 28 Ill. 208. In the latter case the court said:

> "On writ of error, the party, to retain his judgment must show good record. The same objection to a pleading which might have been made on a motion in arrest of judgment, can be urged on error. This being so, the indictment must be condemned . . ."

For equally as long, the settled law of Illinois has been that a motion in arrest of judgment raises questions concerning the sufficiency of an indictment, *Gardner* v. *The People,* 20 Ill. 430, 432, *Klawanski* v. *The People,* 218 Ill. 481, 483, 484; *Henning* v. *Sampsell,* 236 Ill. 375, 379; *People* v. *Goldberg,* 287 Ill. 238, 243, 244; *The People* v. *Martin,* 314 Ill. 110, 117; *The People* v. *Barnes,* 314 Ill. 140; *People* v. *Minto,* 318 Ill. 293, 295; *The People* v. *Schneider,* 334 Ill. 630; *The People* v. *Powell,* 353 Ill. 582.

The People v. *Green,* 368 Ill. 242, 250, 251 recites the course of the law on this subject. It shows that where review is brought by writ of error without more, even in civil cases, any defect in the initial pleading must be considered on review, that in criminal cases if the indictment is void it must similarly be considered on review and this is so when the defendant has pleaded guilty; that where the defendant has pleaded guilty and made a motion for arrest of judgment and where the indictment is bad the proper order is reversal without remanding. And so where the sufficiency of the indictment was not raised in the Appellate Court nor in the Supreme Court until the reply brief was filed, the Supreme Court of Illinois held that the judgment of conviction would be reversed "even though the matter had never been called to the attention of the Supreme Court" until the filing of the reply brief.

This case shows the history of the Illinois law on this subject that there is no need to discuss others which are adequately shown there.

We contend that implicit in the duty to determine the sufficiency of the indictment, is the duty to determine the constitutionality of the law. We reason, that no indictment is sufficient if the law on which it is founded is unconstitutional because as was said in *Ex parte Siebold,* 100 U.S. 371, 376, "An unconstitutional law is void and it is no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but it is illegal and void and cannot be said to be a legal cause of imprisonment." pp. 376, 377.

In this case the Illinois Supreme Court reversed a long line of cases, which began over a century ago, and it did so when these defendants had no opportunity to avail themselves of any remedy, except the remedy which the Su-

preme Court of Illinois in its decision in this case repudiated. We do not contend that the Supreme Court of Illinois has no power or right to change the principles which it considered proper. But we do contend that when it does so while these petitioners relied upon it, it denied them due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States. We contend that is the teaching of *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 674.

We contend that under the cases cited above the constitutional question here presented was properly presented to the Supreme Court of Illinois and should have been decided by it, hence, the question of whether the critical act, set forth as Exhibit A in this petition, is violative of the Fourteenth Amendment of the Constitution of the United States is properly before this Court for decision.

IV.

We confess that there is no showing in the record of a preservation of the point which follows.

We contend that under the doctrine of *Brinkerhoff-Faris T. & S. Co.* v. *Hill,* 281 U.S. 673, the decision of the Supreme Court of Illinois in this case represents a denial of due process. Here, as there, the litigants relied on law settled by the court of last resort in the State. Here, as there the court of last resort reversed the former law to the prejudice of the petitioners. At the time of the decision of the Supreme Court of Illinois it was too late to avail them any other remedy. They relied, as they had a right to do on the principle that they could question the validity of the indictment at any stage of the judicial process. Implicit in that principle is the right to question the constitutionality of the law on which the indictment was founded.

The review was on Writ of Error which allowed, until the Supreme Court of Illinois decided this case, an attack on the indictment in the Supreme Court, even though raised there for the first time.

The motion for arrest of judgment opened up the record for review, including all questions which might have been raised with specificity in the trial court. They assigned as error the repugnance of the critical statute in these pleadings taking the cause to the Supreme Court. They argued the matter in the Supreme Court. That Court refused to consider the question of the repugnancy of the statute to the Fourteenth Amendment notwithstanding that in the long line of cases cited the matter was ripe and properly presented for decision. The Supreme Court of Illinois denied these petitioners "due process of law—using that term in its primary sense of an opportunity to be heard and to defend their substantive right." *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 678.

While we believe, as we contended in the Supreme Court of Illinois, that the cases cited by the Supreme Court of Illinois do not support its ruling, we concede that, apart from leading these petitioners into a *cul de sac*, it has the right and power to change the law on the subject of how constitutional questions may be presented. We discuss the cases cited by the Supreme Court to show that they do not support its ruling solely for the purpose of establishing the petitioners were led into a *cul de sac*.

Mechanic's Saving Ass'n. v. *The People, ex rel. etc.*, 184 Ill. 129 was a civil case and the court carefully limited the decision to that type of case. At page 135 the Court said:

> "Where no objection is made in the trial court by a party in a civil case that he is deprived of his right by an unconstitutional law it cannot be raised here."

The People v. *McCoy,* 132 Ill. 138 was a civil case tried before a court without a jury, where the rules of practice required that the defendant, to preserve questions of law, must present appropriate propositions of law, to the trial court. The proposition which the defendant sought to raise has nothing to do with the adequacy of the complaint.

Chicago, Burlington & Quincy R. R. Co. v. *City of Ottawa,* 165 Ill. 207 is like *The People* v. *McCoy,* 132 Ill. 138 in all material matters.

Cummings v. *The People,* 211 Ill. 392, was a case tried before a court without a jury where propositions of law were submitted. (p. 395) There the defendant asked the trial court to hold the law valid, which he asked the Supreme Court to hold invalid. The Supreme Court held it to be valid and added that it was not before the court for decision, first because the question had not been preserved by appropriate propositions of law (p. 401) and second because it was at the defendant's specific request that the trial court held it to be valid. (pp. 401, 402)

Nonetheless, this case is a sport in Illinois law which, except for this case, consistently has held that a motion in arrest of judgment opens up the record for review and permits the examination of the initial pleading, the indictment to test its validity.

So we say that the petitioners have been denied due process of law in its primary sense. This case is like *Brinkerhoff-Faris Co.* v. *Hill,* 281 U.S. 673, except, as we confessed at the outset, we failed to preserve this point in our Petition for Rehearing. It must be observed however that the attorney for these petitioners made a valiant effort to have the Supreme Court of Illinois correct its

ruling on this point and adhere to earlier and later cases, and when this effort proved unavailing, it was too late to do more.

Respectfully submitted,

Joseph G. Brand

Pro se

Anton A. Morvay

Pro se

EXHIBIT A.

The Questioned Statutes.

256. Confidence game. § 98. Every person who shall obtain or attempt to obtain from any other person or persons any money, property or credit by means or by use of any false or bogus check or by any other means, instrument or device commonly called the confidence game shall be imprisoned in the penitentiary not less than one year nor more than ten years.

257. Confidence game—Indictment. § 99. In every indictment under the preceding section, it shall be deemed and held a sufficient description of the offense, to charge that the accused did, on etc., unlawfully and feloniously obtain, or attempt to obtain, (as the case may be,) from A B (here insert the name of the person defrauded or attempted to be defrauded,) his money (or property, in case it be not money,) by means and by use of the confidence game.

EXHIBIT B.

Opinion.

Docket No. 32374—Agenda 1—March, 1953.
The People of the State of Illinois, Defendant in Error, v. Joseph G. Brand, *et al.*, Plaintiff in Error.

Mr. JUSTICE DAILY delivered the opinion of the court:

Plaintiffs in error, Joseph G. Brand and Anton A. Morvay, whom we shall refer to as defendants, were found guilty by a jury in the criminal court of Cook County of the crime of obtaining money by use and means of a confidence game. They bring this cause here for review on writ of error assigning numerous errors in their trial.

The defendant Brand was president and principal stockholder of an Illinois corporation called Industrial Exchange, Inc., whose principal business was that of barter and exchange. The defendant Morvay was president of an Illinois corporation called Morvay & Company, which was apparently engaged in the construction business. Morvay & Company had offices at 39 S. La Salle Street, in Chicago, where it employed as many as twenty-five persons, including draftsmen who occupied a suite of offices in the same building but not adjacent to the general office of the corporation. Industrial Exchange, Inc., in June of 1949, had an office at 30 S. La Salle Street, Chicago, but some time thereafter moved into the same building as Morvay & Company.

The complaining witness, Herbert Bomar, a man of about thirty-five years of age, was employed by Brunswick Balke-Collender Company in the promotion department. In

June, 1949, after conversations over the telephone, he called at Brand's office to discuss the sale to Brand of a lot he owned. The testimony as to which party first contacted the other is in direct conflict. Bomar testified that Mrs. Brand telephoned his wife and expressed a desire to buy the Bomar property. Brand testified that the situation was just the opposite. During the conversation Brand invited Bomar to accompany him to 39 S. La Salle Street to look at a suite of offices which he planned to move into. They stopped at the coffee shop in the building, and Brand introduced Bomar to the defendant Morvay. During the conversation which ensued Brand talked about a bowling alley building which he was going to build for Bomar to operate. However, Bomar stated that he was only interested in selling his lot. Brand inquired as to why Bomar did not build a home on his lot, and Bomar informed him the costs were too high.

Subsequent to that meeting, Bomar received a notice to vacate the apartment, in which his family lived, within sixty or ninety days. A few days later Brand called at Bomar's office with a book of plans and home designs, and stated that he could build a house for as little as $1000 down. Brand told Bomar to take the plans home and show them to his wife. The plans consisted of a printed book containing some eighty pages, entitled "Designs for Convenient Living," distributed by Home Planners, Inc., and had a price printed on the cover of the book of $1.50. The plan book can be purchased at various stores throughout the country.

Bomar and wife studied the book for several days, and on July 21, 1949, called at Brand's office, which was then located at 39 S. La Salle Street, where they met one Addison Brown, a Mr. Lauren and Brand. The Bomars told Brand that they were interested in design No. 17 in the

book of plans, and Brand sent for Morvay. Morvay came into the office with a cardboard model of design No. 17, and told them that the house would be constructed with lannen stone and would cost around $12,000 to construct on their lot. Bomar testified that he inquired of Morvay how they could build a house for that price, and that he was told that they owned their own rock quarry, their own mill and own lumberyard and had various trading powers by which they could get the materials cheaper than competitors. These statements were denied by the testimony of Brand, Brown and Lauren. Plans were shown to the Bomars and a few minor changes agreed upon. Contracts and papers were brought out and Morvay asked for a $4000 down payment. Brand spoke up and said that the Bomars would only have to make a $1000 down payment, and that they could sign a note to him for $3000. Bomar wrote a check for $1000 payable to the Industrial Exchange, Inc., and gave it to Brand. Other papers were signed at this time, including a building contract, all of which were delivered to Brand. Within a day or two after the meeting other papers were forwarded to the Bomars by mail who signed them and returned them. They included a trust deed for $12,200, which was recorded in the recorder's office of Cook County, and a note in the sum of $3000 payable to Brand.

Bomar testified that Brand and Morvay both told him that the house would be started within a week or ten days and would be finished within four or five months, and Brand admitted that he told Bomar that the house would be started in October and completed by Christmas, 1949. When work was not started on the home by the latter part of July, Bomar made repeated calls to Brand and Morvay to find out when they were going to start, and received numerous excuses. Finally he went to the courthouse and

discovered that none of the permits had been applied for, and he himself obtained all of the necessary permits excepting a building permit. After two months had elapsed, Morvay finally told Bomar that Brand had never given him the $3000 for the second mortgage and that he needed that money before he could start. When Bomar confronted Brand with this he explained that he had a $3000 credit with Morvay & Company which he had acquired by paying some of their bills, and that he had assigned this credit to Bomar in exchange for the $3000 note, and suggested that Bomar see Morvay about it. On September 21, 1949, the Bomars called Morvay's office and met a Colonel Warren who stated that he had nothing to do with the transaction, but recommended that Bomar write out a check to Morvay for the $3000 and go ahead with the deal.

When Morvay came into the office he said, "Let's start over," and tore up the old contract and papers and had the Bomars sign a new building contract which called for a building to be commenced on October 1, 1949, on Bomar's lot and acknowledged receipt of a $4000 down payment, which included a $3000 check that the Bomars gave to Morvay on that date. The contract specified that the total price was to be $16,200, of which the $4000 down payment was a part, and the balance was to be paid by a $12,200 mortgage which was previously recorded. The Bomars insisted on and received a release from Brand of the $3000 note which they had previously executed and delivered to him. Morvay agreed to immediately start construction on the home, but even though building permits were finally obtained no work was done other than having the lot staked out.

In October, Bomar demanded that his money be refunded, and Morvay took Bomar to a builder whom he

claimed was looking over the Morvay projects. The builder, however, denied this. Bomar was then taken to one Hicks, an employee of the Equitable Life Assurance Society, who told him that he was trying to arrange for a loan to handle the papers of Morvay & Company. However, this was denied by Thomas J. Murray who testified that he was sales supervisor for residential mortgages for the states of Illinois and Wisconsin for the Equitable Life Assurance Society of the United States, and that the company would not finance the construction of a home, and further that James Hicks was employed by the Company as a life insurance agent who worked on commission with one of the agencies in Chicago, and had no authority to make any commitments for mortgages. Subsequently, and before the trial of this case, Bomar received $500 from Morvay and $450 from Brand.

The defendants contend that they operated legitimate businesses as legitimate business men, and that they operated according to accepted business practice procedures, but that in the course of their business they became unable to meet their obligations and commitments.

Although the defendant Morvay elected to remain silent, the defendant Brand testified that he had been engaged in the business of barter and exchange which he explained was sometimes called reciprocity with various corporations. He further explained that his method of operation was to acquire a credit with some company by selling their produce for a commission consisting of the credit, and then in turn selling the credit which he had established to a third person who wished to do business with the original company. In the instant case, he established a credit with Morvay & Company by paying some indebtedness of the defendant Morvay and of one Donald Lynn, an officer of Morvay &

Company, who is under indictment and is now a fugitive from justice. It was not established how a credit with Morvay & Company could be obtained by paying the indebtedness of two of the officers of the corporation. Brand further testified that he sold the complaining witness a $4000 credit with Morvay & Company on July 21, 1949, for which he received the sum of $1000 paid to him on that date, and claimed that Bomar owed him the sum of $3000 until September 28, when he claimed to have first received the Bomar note. He contends that that indebtedness continued to exist until the note was paid at the time Bomar entered into a new contract with Morvay & Company.

Plaintiffs in error are represented in this appeal by other counsel than participated in the proceeding in the trial court, and throughout his brief and argument he has asserted that the failure to lay the proper foundation for our consideration of numerous points on appeal lay in the incompetency of the trial counsel. We have carefully examined the record and have reached the conclusion that defendants were ably represented by counsel of their own choosing. Counsel seems to have been familiar with the rules of evidence and the practice in criminal cases. The record was long. Many exhibits were introduced both in behalf of the prosecution and in behalf of the defendants. None of the alleged errors brought to our attention constitute reversible error. We can not justify suspending the well-established rule of appellate practice of this court purely because their appellate counsel would have tried the case in the trial court in a different manner than the theory of defense advanced by the trial counsel.

In addition to the alleged incompetency of trial counsel, defendants contend that their failure to challenge the in-

dictment in the trial court on the question of the constitutionality of sections 98 and 99 of division I of the Criminal Code (Ill. Rev. Stat, 1949, chap. 38, pars. 256-257,) should be waived for reason that it would have been useless to there challenge the indictment since the trial court would have been bound by the previous decisions of this court which found them constitutionally sufficient. Nevertheless, they now assert that it is our duty to reconsider the previous decisions, because we might have failed in earlier decision to have considered other bases on which the constitutionality of these sections might be attacked, and argue that by virtue of our oaths of office we should hold unconstitutional that which is unconstitutional, irrespective of whether the question was saved for review. It is fundamental that the question of the constitutionality of a statute cannot be properly raised for the first time in a court of review, but must have been presented to the trial court and ruled upon by it, and the person challenging its validity must have preserved proper exceptions to such ruling. (*Mechanics' and Traders' Savings Assn.* v. *People ex rel. Auditor of Public Accounts,* 184 Ill. 129; *People* v. *McCoy,* 132 Ill. 138; *Chicago, Burlington and Quincy Railroad Co.* v. *City of Ottawa,* 165 Ill. 207; *Cummings* v. *People,* 211 Ill. 392.) It is a rule of universal application that the reversal of a judgment cannot be urged upon a ground not submitted to the trial court and upon which it did not and was not asked to decide. *Cummings* v. *People,* 211 Ill. 392.

It is contended that given instruction No. 2 was an abstract proposition of law that did not in any way make it applicable to the facts of the case; that it omitted specification of requirements, elements and definition of the crime, and that giving it continued reversible error. The instruction is as follows: "The Court instructs the Jury

that every person who shall obtain from any other person or persons any money, property or credit, by any means, instrument or device, commonly called the Confidence Game, shall be guilty of the crime of confidence game, and it is immaterial that such means, instrument or device takes the form of a business transaction." No one instruction must contain all of the law appertaining to the case. (*People* v. *Barnett,* 347 Ill. 127.) Given instructions Nos. 9 and 10 advised the jury of the proof necessary to convict and also the elements of the crime. Given instruction No. 2 was in the language of the statute and was simply given to inform the jury generally as to the law of the case. It was not error to give the same. *People* v. *Crawford,* 278 Ill. 134.

Defendants contend that the refusal of the trial court to give certain instructions in their behalf constituted reversible error. We deem it unnecessary to set forth the context of the refused instructions, and consider it sufficient to state that we have considered the given instructions in connection with the court's refusal to offer the others, and are of the opinion that the jury was adequately instructed as to the elements of the offense, their duties as jurors and of the weight of the evidence, and we are of the opinion that no reversible error was committed by the refusal to give the instructions.

Considerable evidence was introduced showing the commission of similar offenses by Brand and Morvay against one Ivan W. Brunk and against Harold F. Baker. It is not contested that evidence of prior similar offenses is competent to prove the criminal intent of one accused of violating the confidence game statutes. (*People* v. *Novotny,* 305 Ill. 549; *Dußois* v. *People,* 200 Ill. 157.) However, it is the contention of the defendants that the evidence

relating to the Baker and Brunk cases is not admissible as against the defendant Brand inasmuch as there is no connection in the record between him and the other victims, and it is further contended that the evidence of those transactions is not admissible as against the defendant Morvay, as they claim that those offenses were committed subsequent to the offense against Bomar. The record discloses the date of the Baker transaction with Morvay to be August 16, 1949, and the date of the Brunk transaction to be September 16, 1949. Defendants argue that the date of the Bomar transaction with Morvay was the date that Morvay paid the money to Brand on July 21, 1949. We have repeatedly held that evidence of the commission of subsequent crimes is not admissible for the purpose of proving guilty knowledge or intent in the absence of proof that the defendant has formerly committed similar offenses, and that his intent in the commission of the first offense may not be presumed from the commission of subsequent similar and distinct offenses. (*People* v. *Moshiek,* 323 Ill. 11; *People* v. *Hobbs,* 297 Ill. 399.) Inasmuch as Bomar paid money on July 21 and additional sums on September 21, 1949, the offense against him was not completed until the latter date, and, therefore, the Baker and Brunk cases were not subsequent offenses.

The admission of such evidence is subject to the limitation that it may be considered by the jury only in determining the intent of the accused. Defendants insist that the court had an affirmative duty to admonish or instruct the jury that consideration of the testimony as to those other offenses should be limited to the question of defendants' intent, and they also contend that the court should have instructed the jury that the evidence of the Baker and Brunk cases should be disregarded as far as the defendant Brand is concerned. No affirmative duty to admonish or

instruct the jury attaches to the court because evidence of such nature is introduced, and the defendant having failed to invoke the ruling by exception or by request for admonition or instruction cannot now complain. *People* v. *Tilley,* 406 Ill. 398.

It is next contended by the defendants that the crime of obtaining money or property by means of the confidence game is undefined and not provable with the certainty required of crimes by its nature. The contrary has been repeatedly held ever since the enactment of the statute. No more certain definition could be given than that method of swindling called the confidence game. The means that may be used are different and varied, but that fact no more renders the statute uncertain than the different means employed to gain entrance to a building make burglary uncertain, or the various means by which death may be caused to render the crime of murder uncertain. *People* v. *Bertsche,* 265 Ill. 272; *Morton* v. *People,* 47 Ill. 468; *Maxwell* v. *People,* 158 Ill. 248.

The defendants contend that the crime charged against them was not proved beyond all reasonable doubt and the *corpus delicti* was not proved. The confidence game has been defined as any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler. (*People* v. *Gair,* 379 Ill. 458.) The fact that the transaction was made to assume the form of a business deal is not material, if in fact it was a swindling operation. (*Chilson* v. *People,* 224 Ill. 535; *People* v. *Westrup,* 372 Ill. 517.) However, there may be swindling in a business transaction without the person who is responsible for the swindling being guilty of operating the confidence game. Thus, where the confidence of the victim is honestly obtained through a course of regular business dealings, the

confidence game statute is not violated. (*People* v. *Schachter,* 361 Ill. 573.) The confidence game statute was designed to reach a class of offenders known as "confidence men" who practice swindling schemes as various as the mind of man is suggestive. (*People* v. *Martin,* 372 Ill. 484.) The essence of the crime of obtaining property by means of the confidence game is a trust reposed in the swindler, and betrayed by him, as a means of obtaining the victim's property or money. The moving cause for the victim's parting with his money or property and giving it to the accused must be the confidence reposed in the accused. (*People* v. *Gallowich,* 283 Ill. 360.) There is no basis for the defendant's contention that there was a mere breach of an ordinary business contract honestly entered into with the parties under a dealing at arm's length. The confidence of the complaining witness was secured by the promise to build them a home at a low cost for a low down payment, furthered by the claim of ability to perform the contract with the statements that they controlled the sources of materials and could obtain them at a lower price than their competitors, and by the use of employees of legitimate financial institutions to give the impression that these institutions were willing to support them. The intent to swindle on the part of Brand was evidenced by his selling to the complaining witness a purported credit with Morvay & Company, which he obtained by paying the bills of two of the officers of the company, and which he well knew at the time of the sale that he could not recover from the corporation. The intent to swindle by the defendant Morvay was further evidenced by his failure to obtain building permits, or in any way attempt to carry out the terms of his contract, and by the fact that he must have known from the condition of his bank accounts, which were introduced in evidence, that he did not have the financial ability to

carry out the terms of the contracts which he entered into with the complaining witness.

We are satisfied that there is sufficient evidence of the presence of the element of confidence and the betrayal of that confidence to justify the jury bringing in a verdict of guilty. When the evidence is clear and convincing, this court will not substitute its judgment for that of the jury.

It is urged by the defendants that the conduct of the jury in rendering its verdict in less than two hours after receiving its instructions in a case with as many exhibits and as long a record as the instant case is an indication that the jury did not consider all of the evidence after the case was referred to it, and thus the defendants were deprived of a trial by jury. There is no evidence in the record that the jury or any of its members violated their oaths as jurors, and in the absence of such evidence we must assume that they acted according to law. They contend that the form of the verdict which found the defendants "guilty of confidence game in the manner and form charged in the indictment" did not contain the essential element of the crime, and argue further that inasmuch as defendants were indicted under three counts, of which two were *nolle prossed*, that the jury did not know on what count they were finding the defendants guilty. There is no merit to their contention in this regard. The rule is that in determining the sufficiency of a judgment of conviction the entire record will be searched, and all parts of the record interpreted together, and a deficiency in one place may be cured by what appears in another. (*People* v. *Woods*, 393 Ill. 586; *People ex rel. Ewald* v. *Montgomery*, 377 Ill. 241; *People ex rel. Sammons* v. *Hill*, 345 Ill. 103.) The test of the sufficiency of a verdict is whether the jury's intention can be ascertained with reasonable certainty.

(*People ex rel. Reed* v. *Williams,* 334 Ill. 241.) The law does not require specific repetition, and a verdict containing a reference to the allegations of an indictment is sufficient. (*People* v. *Norwitt,* 394 Ill. 553; *People* v. *Jensen,* 392 Ill. 72.) Looking to the evidence and instructions by which the issues were submitted to the jury, we must conclude that the jury was aware of the count upon which it found defendants guilty and that its verdict was sufficient to inform the court of its intention.

It is unnecessary for us to consider the contention that the State's Attorney's closing argument was prejudicial and replete with misstatement of law. No question as to the propriety of his argument was raised in the motion for a new trial. Points not set out in a motion for a new trial are waived. *People* v. *Vickers,* 326 Ill. 290.

The next contention of the defendants is that the proceedings were void because the criminal court of Cook County functioned without judges who were designated in accordance with section 26 of article VI of the constitution, and who had taken an oath to perform the duties of said court. We were called upon to decide this identical point in the case of *People* v. *Lindsay,* 412 Ill. 472, and there held that the method of assigning judges of the criminal court of Cook County pursuant to the rules of the court was constitutional, and that it was unnecessary for a judge of the circuit court to take an additional oath as a judge of the criminal court. The present contention necessitates no further elaboration of that decision.

We have carefully considered the entire record in this case, as well as the arguments of counsel and the authorities cited by him, and we are of the opinion that the judgment of the criminal court of Cook County should be affirmed.

Judgment affirmed.